

January 31. 1771.

REPLIES

F O R
Captain BASIL HERON of the North British Dragoons;

T O T H E
ANSWERS for JOHN SYME of Meikle Culloch writer to
the signet, in name of himself, and others.

THE complainer little expected to be obliged to maintain an argument before your Lordships, in behalf of this proposition, that different infeftments might be taken in favour of different persons, by virtue of a clause of dispensation in a charter, when the lands contained in that charter had been parcelled out by way of alienation to various proprietors. The late cases wherein this question occurred, decided both here and in the last resort, seem to have fixed this point of law beyond a possibility of doubt. It is true indeed, that, in some cases relative to the qualifications of freeholders in the county of Forfar, previous to the late general election, your Lordships found an infeftment taken in

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that manner null, but that judgment was reversed, first, in the case of David Moodie, and thereafter in the case of many other freeholders by judgments in the House of Lords; and afterwards your Lordships thought yourselves so much tied down by those judgments, that, in the case of David Dundas of Newhalls, and others, freeholders in the county of Linlithgow, you sustained infestments taken in that way, which judgments were afterwards affirmed upon an appeal to the House of Lords.

In these cases it was argued, that, since the statute 1617, appointing the recording of feifines in a public register, patent to all the lieges, no reason can be assigned in sound sense or expediency, why the superior may not give infestment to his vassal upon any part of the superior's estate, although no part of the estate conveyed to the vassal. The only use of giving infestment upon the lands themselves, was to render the infestment public, in order to prevent frauds, and the lieges from being ensnared by double rights: But, as the public records are the only notification which the lieges are obliged to regard, and which, in fact, they do depend upon the observance of, the other form becomes superfluous and unnecessary. If infestment has actually been taken, if an instrument certifying the fact is extended; and, if that instrument is recorded in the proper register, where it is patent to the inspection of all the lieges; it surely can be of no moment to enquire, whether every punctilio of the strict feudal forms, which, before the registration of feifines were useful and expedient; and as it admitted that the crown has full powers to unite tenements lying discontinuous; so that an infestment taken upon one of these tenements should be sufficient for the other tenement, though lying at an hundred miles distance, the complainer can discover nothing in the principles of law, reason, or public expediency, why the crown cannot authorise an infestment to be taken upon any part of the crown's property, though
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upon the lands intended to be vested by the infeftment, as the whole falls to be considered as an united tenement in the crown who authorises the infeftment.

This reasoning applies precisely to the case before your Lordships. And as judgment was pronounced agreeable to it by the house of Lords, in no fewer than thirteen different cases from the county of Forfar, and by your Lordships, in four different cases from the county of Linlithgow, which were affirmed by the house of Lords: A similar decision was also given by your Lordships, in two cases from the county of Lanerk; and in some others from the county of Renfrew, where the judgment of this court was acquiesced in, no appeal having been brought.

The respondents do indeed labour to establish a distinction between the present case and those in which these judgments were pronounced. But, in the humble apprehension of the complainer, those distinctions do not at all affect the merits of the question. The distinctions they argue upon are two. The first founded upon the words of the clause of dispensation; the other, that, in the former cases, the qualifications of the freeholders were only literents, which could not be considered as proper alienations, being nothing else but burdens; so that the infeftment sustained must be considered on the footing of an infeftment to the *fiar*, properly taken under the clause of dispensation.

As to the first of these, the argument of the respondents rests upon the word *unica* in the clause of dispensation; from which they contend, that that clause authorises only a single seifine to be taken; consequently, when more seifines than one were taken, the powers given by the clause of dispensation were exceeded, and the seifines void.

But the clause truly will not bear this interpretation; for it evidently gives a power of taking more than one seifine; for it authorises to take *unica fasina nunc et in omni tempore futuro*; and it gives this power not only to the person in whose favour the charter is granted, but *ejusq. predict.* that is to say,

say, *heredibus et assignatis*; consequently, without any new charter, though infeftment had been actually taken in the person of the grantee, his heirs, upon a special service, were intitled to take another seifine, by virtue of the clause of dispensation. This shews, therefore, that the word *unica* must bear another sense than the respondents put upon it; and imports no more than this, that it should not be necessary to take more seifines than one in virtue of that dispensation; but by no means that it should be a prohibition to take more than one.

Indeed, it is unnecessary to enlarge on this point. For tho' the words of the precept may have been a little different in the two charters in the county of Forfar, which gave rise to the questions concerning the qualifications of the freeholders of that county, they were the same in the charter upon which infeftment was taken in the disputed cases from Linlithgowshire. With respect to that county, the Earl of Hopeton had taken out a charter of the lands of Craigtown and Ballencrieffe, and had conveyed parcels of these lands to the different freeholders, all of whom, in virtue of that dispensing clause, took infeftment at the mansion house of Ballencrieffe; and the dispensing clause itself was in the following words. 'Et nos volumus et concedimus, quod unica
'*fasina*, per deliberationem terræ et lapidis solummodo,
'nunc et in omni tempore futuro, capiend. per dictum Jo-
'annem Comitem de Hopeton, ejusq. prædict. apud mane-
'rici locum de Craigtoun, seu apud maneriei locum de Bal-
'lencrieffe, seu super solo alicujus alterius partis, dict. singula-
'rum terrarum supra script. sufficientem fore *fasinam* pro o-
'mnibus et singulis terris, decimis, jure patronatus, jurisdic-
'tionibus aliisque supra disposit. quamvis eadem discon-
'tigue et in diversis locis jaceant: quocirca, et cum o-
'mni quæ desuper sequi poterit, vel eadem objici poterit, nos
'pro nobis, et dispensavimus in perpetuum.' The precept of seifine was conceived in the self-same words with this dispensing clause.

After quoting the clause of dispensation from Lord Hopton's charter, the complainer need add little argument to prove, that the clause of dispensation, in virtue of which his infestment was taken, authorised the taking of more infestments than one, as both your Lordships and the house of Lords sustained no fewer than four several infestments taken in virtue of the dispensing clause just now recited.

As to the other distinction endeavoured to be established by the respondents, viz. That, in the questions from Linlithgow-shire and Forfar shire the qualifications were in the form of liferents, which fell to be considered as burdens upon the property, rather than alienations; whereas, in the present case, they are real alienations. The complainer apprehends, that this will be of very little weight with your Lordships; for, the whole argument in those cases rested upon this, That a clause of dispensation authorising infestment to be taken after an alienation; and, if the complainer is rightly informed; when these cases came to be decided before the house of Lords, that Right Honourable house expressed their opinion, that such infestments were valid, even though there was a total alienation of the fee, as well as of the liferent.

In the cases from Linlithgow shire, a search of the records was made; and the following, among many other instances of infestments taken by virtue of clauses of dispensation, were laid before your Lordships. ' Seisine registered 20th October 1746, in favours of the Duke of Argyll, of an annual rent of L. 188:8:0 effecting to the principal sum of L. 3768 Sterling, upon an heritable bond by John Earl of Loudon, furth of all and whole these parts and portions of the lands and barony of Loudon, viz. (a number of particular farms) all which farms are proper parts and portions of, and lie within the barony of Easter and Wester Loudon, regality thereof, and she-

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‘rissdom of Air. The seifine is taken at the manor place
 ‘of Loudon, principal messuage of the barony thereof in
 ‘virtue of the dispensation contained in the charter of
 ‘Hugh Earl of Loudon father to the granter; which ma-
 ‘nor place is no part of the lands out of which the annual-
 ‘rent is upliftable.’

‘James Earl of Southesk granted heritable bond, bearing
 ‘infestment in his lands of Seigy, in Fife, for 10,000
 ‘merks Scots principal, to the principal and masters of St
 ‘Leonald’s college in St Andrew’s, who conveyed the same
 ‘to Thomas Fordyce of Ayton in trust, for the behoof of
 ‘the York Building Company, who was thereon infest at
 ‘the manor place of Kinaird, as being the place appointed
 ‘by the dispensation in the charter under the great seal grant-
 ‘ed to the said company, of all the many lands, lordships, earl-
 ‘doms, baronies, and others that belonged to the said late
 ‘Earl of Southesk, dated 11th February 1744. The place of
 ‘taking the infestment is in Angus; but the lands out of
 ‘which the annualrent is upliftable, lie in the shire of
 ‘Fife.’

‘Another instance much of the same kind, is another herita-
 ‘ble debt due by the same James Earl of Southesk to Mr John
 ‘Callendar writer in Edinburgh, whose heir entered a claim
 ‘which was sustained by the commissioners of enquiry.
 ‘When the York Building Company came to pay this debt,
 ‘they granted precept of *Clare* for infesting Mr Callender’s
 ‘heir at the said manor place of Kinaird, conform to the
 ‘dispensation contained in charter granted to them Febru-
 ‘ary 1744; and the seifine upon that precept, which is re-
 ‘gistered in the general register of seifines 23d October
 ‘1744 bears, that infestment was given accordingly at the
 ‘said manor place of Kinaird, in virtue of the said dispensa-
 ‘tion so communicated by the York Building Company in
 ‘their precept of *Clare*.

‘ Seifine

Seifine in favours of the Earl of Balcarras, of an annual rent, effeiring to L. 14,400 Stots, upliftable out of certain parts of the estate of Kinnoull, therein mentioned, proceeding upon a precept of *clare constat*, by the Earl of Kinnoull, to the Earl of Balcarras, as heir to his sister in the said annualrent; and the infeftment is given by earth and stone allenary, for the lands at the Mannor-place of Dupplin, in virtue of dispensations in charters of the estate of Kinnoull.

Seifine registrated, 4th April 1748, in favour of Lady Glenorchy, of certain parts of the earldom of Breadalbane. In this seifine the procurator, baillie, notar, and witnesses, are said to have passed to the ground of the lands of the earldom of Breadalbane, to that place where the manor place of Finlarig is situate, being the place appointed by the charter of erection, therein mentioned, for taking infeftment in the whole lands, and others contained in the said earldom of Breadalbane, with the pertinents, of which the lands after-mentioned are a part. The seifine proceeds upon an heretable bond of locality granted by John Earl of Breadalbane to Lady Glenorchy, wherein he obliged himself to infeft her, during her lifetime, in sundry lands, mills, and other different tenements, but not in the above Manor-place itself, to be holden, either *a me* or *de me*, and that in implement of her marriage settlements. And infeftment is given to her thereof, by earth and stone allenary, at the said Manor-place of Finlarig, in virtue of the dispensations contained in his Lordship's charter.

Seifine registrated 3d June 1766, in favours of Mrs Janet Rannie, second daughter of the deceased Mr Rannie of Melvil, following on a precept directed on her service as one of the heirs portioners of her father, by which infeftment is given to her of the said lands and barony of Melvil comprehending mills and others therein mentioned, in so far as extends to her part and portions, as second lawful daughter

' daughter, and one of the two heirs portioners, served and
' returned of the said deceased David Rannie, Esq: her fa-
' ther; by which seifine infestment is given to the said Mrs
' Janet Rannie, at the Manor place of Melvil, although no
' part of the mansion-house belongs to her, but goes wholly
' to her elder sister as a *praecipuum*.

None of all these infestments could be supported on the
principles assumed by the respondents, for they are all, of
them separate and distinct from the infestments given to
the proprietors, or fiars of the lands; they could not, there-
fore, be supported by the idea of the dispensation, operating
directly in his favour, and only consequentially as to them.
They afford therefore so many arguments, drawn from
practice, in favours of the complainer, and at the same
time shew how hazardous it would be to recede from the
doctrine established by the ultimate decisions in the cases of
the freeholders of Forfar-shire and Linlithgow shire, as it
might tend to shake the security of the property of the
lieges, which rest upon titles made up on the faith of the
common practice.

Upon the whole, the complainer apprehends, that the
same decision falls to be pronounced in his case as hath
been pronounced in so many other similar cases, from dif-
ferent counties where it hath been decided; and, of conse-
quence, that he is intitled to recover a decree of your
Lordships ordaining him to be added to the roll of free-
holders for the stewartry of Kirkcudbright.

In respect whereof, &c.

ANDREW CROSBIE.